

SHORTCOMINGS IN U.S. WORKPLACE PROTECTION POLICY NECESSITATE
THE EXPANSION OF NON-DISCRIMINATION LAWS

by
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Abstract

Although discrimination leads to wide-ranging negative impacts, such as health problems and a decline of economic advancement, significant shortcomings remain in status quo U.S. employment non-discrimination protection policy. Two key areas are explored: the lack of protections for lesbian, gay, bisexual, transgender and questioning (LGBTQ) individuals in the workplace and the failings of employee minimums tied to Title VII of the Civil Rights Act of 1964 and subsequent non-discrimination federal laws. With an importance placed on achieving equity and correcting the prejudiced mistakes of the past that helped generate the lack of inclusive non-discrimination protections, analysis details the importance of updating non-discrimination federal policy and parses the benefits of such actions. The support of existing and upcoming legislatures to promote the expansion of civil rights to protect the LGBTQ community is advocated for, but there is also discussion of furthering these efforts. An alternative policy option would entail the removal of employee minimums nationwide, as these minimum employee thresholds are handled mostly at the state level, with regulations ranging from no minimum to minimums exceeding federal policy. Written as a policy memo addressed to U.S. Senator Cory Gardner of Colorado, implications as to moral platitudes are incorporated, but decisions are evaluated by criteria linked to Gardner's political future, namely defending his seat in the upcoming 2020 general election. Once labelled an "anti-LGBT hate state," Colorado is trending towards acceptance and elected the first openly gay governor in the country, Jared Polis. To maintain his seat, Gardner must calculate political risk while weighing the needs of his constituents and is advised to consider the following proposal.

Advisor: Paul Weinstein, Jr.

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TO Cory Gardner, Republican U.S. Senator from Colorado

FROM Sarah-Grace Parr

SUBJECT Shortcomings in U.S. Workplace Protection Policy Necessitate the
Expansion of Non-Discrimination Laws

DATE December 17, 2018

Action-Forcing Event

On July 30, 2018, former Attorney General Jeff Sessions announced the creation of the Department of Justice Religious Liberty Task Force, set to protect religious communities throughout the U.S. from discrimination.¹ “We have gotten to the point where courts have held that morality cannot be a basis for law...and where one group can actively target religious groups by labeling them as a ‘hate group’ on the basis of their sincerely held religious beliefs.”² Sessions cited freedom of religion as the U.S. “first freedom,” an American principle from the beginning, along with the persecution Jack Phillips faced upon his refusal to sell a cake to a same-sex couple, as detailed in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. This further crystalizes President Donald Trump and his administration’s brand of religious nationalism as an avenue to elevate the right to religious exemptions above other legal and constitutional rights.³

¹ CBS/AP. “Jeff Sessions Announces Creation of ‘Religious Liberty Task Force.’” *CBS News*, CBS Interactive, 30 July 2018, www.cbsnews.com/news/jeff-sessions-religious-liberty-task-force-announced/; Wheeler, Lydia. “Sessions Announces ‘Religious Liberty Task Force’.” *TheHill*, The Hill, 30 July 2018, thehill.com/regulation/administration/399482-sessions-announces-religious-liberty-task-force.

² “Attorney General Sessions Delivers Remarks at the Department of Justice’s Religious Liberty Summit.” *The United States Department of Justice*, 30 July 2018, www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit.

³ Green, Emma. “Donald Trump Declares a Vision of Religious Nationalism.” *The Atlantic*, Atlantic Media Company, 2 Feb. 2017, www.theatlantic.com/politics/archive/2017/02/donald-trump-national-prayer-breakfast/515445/; Jenkins, Jack. “Trump Is Creating a New Form of Christian Nationalism Centered on

Statement of the Problem

Discrimination can have serious health consequences, and sexual minorities living in communities with high levels of prejudice die more than a decade earlier than those in less discriminatory communities.⁴ Furthermore, LGBTQ individuals living in states where it is legal for businesses to deny people service based on their sexual orientation have a higher risk for mental health problems.⁵ One recent study found a 46 percent increase in the proportion of sexual minorities reporting depression, anxiety and other emotional problems in states that passed denial-of-service laws; no increase was observed in states without these laws.⁶ The current political and social environment threatens sexual minorities' equity and health, putting at risk the LGBTQ community's progress as more states and municipalities pass "religious liberty" laws, allowing for discrimination based on gender and sexual identity.⁷

With no federal regulation requiring employment non-discrimination laws on the basis of gender and sexual identity, community ordinances, state laws and federal rulings instead dictate policy at the local level. Twenty-one states, along with the District of Columbia

Himself." *ThinkProgress*, ThinkProgress, 25 Jan. 2017, thinkprogress.org/trump-is-creating-a-new-form-of-christian-nationalism-centered-around-himself-d8687f41cc49/; Williams, Jennifer. "Current Events Collide with Professor's Research on Religious Liberty." *William and Mary*, 4 Sept. 2018, www.wm.edu/news/stories/2018/current-events-collide-with-professors-research-on-religious-liberty.php.

⁴ Hatzenbuehler, Mark L, et al. "Structural Stigma and All-Cause Mortality in Sexual Minority Populations." *Social Science & Medicine*, vol. 103, Feb. 2014, pp. 33–41., doi:<https://doi.org/10.1016/j.socscimed.2013.06.005>.

⁵ Khullar, Dhruv. "Stigma Against Gay People Can Be Deadly." *The New York Times*, The New York Times, 9 Oct. 2018, www.nytimes.com/2018/10/09/well/live/gay-lesbian-lgbt-health-stigma-laws.html.

⁶ Raifman Julia, et al. "Association of State Laws Permitting Denial of Services to Same-Sex Couples With Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis." *JAMA Psychiatry*. 2018. doi:10.1001/jamapsychiatry.2018.0757

⁷ Gessen, Masha. "How Trump Uses 'Religious Liberty' to Attack L.G.B.T. Rights." *The New Yorker*, The New Yorker, 11 Oct. 2018, www.newyorker.com/news/news-desk/how-trump-uses-religious-liberty-to-attack-lgbt-rights; Khullar, Dhruv. "Stigma Against Gay People Can Be Deadly." *The New York Times*, The New York Times, 9 Oct. 2018, www.nytimes.com/2018/10/09/well/live/gay-lesbian-lgbt-health-stigma-laws.html.

(D.C.), prohibit discrimination on sexual orientation and gender identity. One state prohibits discrimination based on sexual orientation only. Six states prohibit discrimination against public employees based on sexual orientation and gender identity. Five states prohibit discrimination against public employees based on sexual orientation only.⁸

While laws of this nature may not intentionally stave away economic stimulants, they certainly have the capacity of lasting financial impacts. In 2018, Georgia, which has no LGBTQ workplace protection laws at the state level, saw the second-highest rate of complaints of workplace discrimination from LGBTQ employees in the nation.⁹ This has precipitated concern among the area's business community. As of July 2018, Georgia dropped from number two to number seven on the annual "America's Top States for Business" scorecard. Jeff Graham, the Executive Director of Georgia Equality, wrote, "At a moment when states are struggling to maintain a competitive edge, Georgia lawmakers should be doing everything in their power to entice businesses to invest in the state. The future success of Georgia's economy relies on its ability to attract businesses to relocate to the state and to attract the best and brightest talent. A statewide civil rights law would send the message that Georgia is truly open for business to all."¹⁰

Amazon's closely-watched contest to land the company's new HQ2 headquarters further signifies the potential fiscal ramifications for states lacking non-discrimination laws. It is

⁸ "State Maps of Laws & Policies: Employment." *Human Rights Campaign*, www.hrc.org/state-maps/employment.

⁹ Prabhu, Maya T. "Study: Georgia Second for Occurrence of LGBT Workplace Discrimination." *Politics.myajc*, The Atlanta Journal-Constitution, 20 Aug. 2018, politics.myajc.com/news/state--regional-govt--politics/study-georgia-second-for-occurrence-lgbt-workplace-discrimination/EjIXMWbzZLy5CKwKX4YNNN/.

¹⁰ Graham, Jeff. "Viewpoint: Georgia Lawmakers' Anti-LGBT Crusade Is Taking a Tangible Toll." *Bizjournals.com*, The Business Journals, 13 July 2018, www.bizjournals.com/atlanta/news/2018/07/13/viewpoint-georgia-lawmakers-anti-lgbt-crusade-is.html.

believed the company factored LGBTQ rights into its selection process.¹¹ According to two people familiar with the matter who spoke upon the condition of anonymity, “Although the company’s search materials don’t make it explicit, Amazon has quietly made rights for and acceptance of gay and transgender people part of its criteria in choosing a second headquarters.”¹² Amazon employees also lobbied the company’s top executives to situate HQ2 in a LGBTQ-friendly city.¹³ One takeaway is certain, in choosing the two winners, the New York and the D.C. Metro areas, no new business was gained by municipalities lacking workplace protections for at least some classes, including LGBTQ individuals.

Apple is another example of potential large-scale business being stymied by a lack of workplace protections. Apple is set to announce the site of a new U.S. campus this year.¹⁴ North Carolina’s “Triangle” corridor is a leading contender for this new business hub; however, investors and employees at Apple are concerned about the state’s lack of non-discrimination policies. As of August 2018, Apple executives expressed concern about the state’s inconsistencies and track record on LGBTQ rights.¹⁵ A spokesperson from the Human Rights Campaign states, “Apple has an opportunity to lead by locating and

¹¹ Gray, Sarah. “LGBT Rights May Be a Factor in Amazon's HQ2 Pick. Here's How.” *Fortune*, Fortune, 27 Apr. 2018, fortune.com/2018/04/27/lgbt-rights-amazon-hq2/.

¹² O’Connell, Jonathan. “The Unspoken Factor in Amazon's Search for a New Home: Jeff Bezos's Support for Gay Rights.” *The Washington Post*, WP Company, 20 Apr. 2018, www.washingtonpost.com/business/economy/the-unspoken-factor-in-amazons-search-for-a-new-home-jeff-bezoss-support-for-gay-rights/2018/04/20/9cfa8c66-31e6-11e8-8bdd-cdb33a5eef83_story.html?utm_term=.47351a113bc9.

¹³ Day, Matt. “Amazon Employees Pushed Execs to Seek LGBT-Friendly City for HQ2.” *The Seattle Times*, The Seattle Times Company, 23 Apr. 2018, www.seattletimes.com/business/amazon/amazon-employees-pushed-execs-to-seek-lgbt-friendly-city-for-hq2/.

¹⁴ Campbell, Mikey. “Apple Announcement of North Carolina Campus 'Imminent,' Report Says.” *Apple News and Rumors since 1997*, AppleInsider, 31 May 2018, appleinsider.com/articles/18/06/01/apple-announcement-of-north-carolina-campus-imminent-report-says.

¹⁵ Fingas, Roger. “Apple Worried about Constitutional Changes in Considering North Carolina Campus.” *Apple News and Rumors since 1997*, AppleInsider, 24 Aug. 2018, appleinsider.com/articles/18/08/25/apple-worried-about-constitutional-changes-in-considering-north-carolina-campus.

investing in places that fully protect LGBTQ people. North Carolina is not one of those places.”¹⁶

History/Background

LGBTQ Civil Rights Advancements Face a Slippery Slope of Regressive Policies

The LGBTQ community is no stranger to civil rights battles; however, recent years marked progress within the community. In 2014, President Obama issued Executive Order 13673, prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity.¹⁷ Nearly a year later in 2015, the landmark case of *Obergefell v. Hodges* ruled that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.¹⁸ The dissenting opinion issued by Associate Justice Clarence Thomas made explicit reference to faith-based institutions’ liberties, and Thomas predicted that the majority’s decision could have “potentially ruinous consequences for religious liberty.”¹⁹ While not a new argument, the increased usage of religious freedom subsequent the 2016 election has defined a policy shift and identifies a problem linked closely to norms.

¹⁶ Dalesio, Emery P. “Gay-Friendly Apple Weighs North Carolina despite LGBT Laws.” *Phys.org - News and Articles on Science and Technology*, Phys.org, 19 May 2018, phys.org/news/2018-05-gay-friendly-apple-north-carolina-lgbt.html.

¹⁷ Ford, Zach. “Obama Administration Announces Executive Order Protecting LGBT Employees Of Federal Contractors.” *ThinkProgress*, ThinkProgress, 16 June 2014, thinkprogress.org/obama-administration-announces-executive-order-protecting-lgbt-employees-of-federal-contractors-9833eea7d6e2/.

¹⁸ “*Obergefell v. Hodges*.” *SCOTUSblog*, SCOTUSblog, www.scotusblog.com/case-files/cases/obergefell-v-hodges/.

¹⁹ “Dissenting Opinions in the Supreme Court's Same-Sex Marriage Ruling.” *CBS News*, CBS Interactive, 26 June 2015, www.cbsnews.com/news/dissenting-opinions-in-the-supreme-courts-same-sex-marriage-ruling/.

In 2017, with respect to the upcoming *Zarda v. Altitude Express, Inc.* case, Sessions asserted through a friend-of-the-court brief that Title VII of the Civil Rights Act of 1964 does not apply to sexual orientation discrimination and that efforts to amend Title VII's scope should be directed to Congress rather than the courts.²⁰ Instead, the decision issued in February 2018 by the U.S. Court of Appeals for the Second Circuit pushed back, releasing an opinion that "sexual orientation discrimination constitutes a form of discrimination" and is therefore a form of sex discrimination.²¹

While potentially having wide-ranging national significance for gay rights, discrimination of the LGBTQ community is far from settled at a federal level. *Altitude Express, Inc.* requests the Supreme Court to reverse the aforementioned appeals court ruling,²² and a group of sixteen states on August 23, 2018, urged the Supreme Court to rule that companies can fire workers based on their sexual orientation and gender identity without violating federal workplace discrimination law.²³ Additionally, the outcome of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* has aided in laying the groundwork for

²⁰ Feuer, Alan. "Justice Department Says Rights Law Doesn't Protect Gays." *The New York Times*, The New York Times, 27 July 2017, www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html?login=smartlock&auth=login-smartlock.

²¹ Feuer, Alan, and Benjamin Weiser. "Civil Rights Act Protects Gay Workers, Appeals Court Rules." *The New York Times*, The New York Times, 26 Feb. 2018, www.nytimes.com/2018/02/26/nyregion/gender-discrimination-civil-rights-lawsuit-zarda.html; "LGBT Rights Milestones Fast Facts." *CNN*, Cable News Network, 10 Nov. 2018, www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html.

²² Opfer, Chris. "Trump Administration Rift on LGBT Worker Rights Nears Showdown." *Bloomberg BNA News*, 31 July 2018, news.bloomberglaw.com/daily-labor-report/trump-administration-split-on-lgbt-worker-rights.

²³ Opfer, Chris. "States Ask Supreme Court to Limit LGBT Protection." *Bloomberg Law*, Labor & Employment on Bloomberg Law, 24 Aug. 2018, www.bna.com/states-ask-supreme-n73014481980.

future use of the religious liberty argument and is currently championed by the Department of Justice.²⁴

In March 2018, the First Amendment Defense Act (FADA), “a bill designed to pit religious freedom against gay marriage,” was reintroduced in Congress by Senator Mike Lee of Utah and 21 other Republicans. The bill was previously introduced in the House and Senate in 2015. Although the bill did not make it out of committee, now former Attorney General, and then Senator Sessions, was one of FADA’s original sponsors, and in 2016, President-elect Trump said he would support the legislation.²⁵

Although President Trump promised to be an ally, he has already successfully eroded some of the LGBTQ community’s workplace progress. In 2017, for example, Trump signed an executive order that rescinded Obama’s Executive Order 13673, specifically rolling back protections for LGBTQ workers. This policy change directly impacted more than one million LGBTQ workers within the U.S., as the federal level, along with most states, lack explicit protections for sexual orientation and gender identity.²⁶

Later that year, the Justice Department announced that it does not consider workplace discrimination against LGBTQ individuals to be prohibited under federal civil rights law.²⁷

Moreover, in 2017 alone, 129 anti-LGBTQ state bills were introduced across 30 states.

²⁴ Williams, Jennifer. “Current Events Collide with Professor’s Research on Religious Liberty.” *William and Mary*, 4 Sept. 2018, www.wm.edu/news/stories/2018/current-events-collide-with-professors-research-on-religious-liberty.php.

²⁵ Moreau, Julie. “GOP Reintroduces Bill Pitting ‘Religious Freedom’ against Gay Marriage.” *NBCNews.com*, NBCUniversal News Group, 12 Mar. 2018, www.nbcnews.com/feature/nbc-out/gop-reintroduces-bill-pitting-religious-freedom-against-gay-marriage-n855836.

²⁶ Kutner, Jenny. “Trump Rolls Back Protections for LGBTQ Workers, Despite Recent Promises.” *Vogue*, Vogue, 29 Mar. 2017, www.vogue.com/article/trump-executive-order-rolls-back-lgbtq-protections.

²⁷ Levy, Pema. “Justice Department: LGBT Workplace Discrimination Is Allowed under Civil Rights Law.” *Mother Jones*, 27 July 2017, www.motherjones.com/politics/2017/07/justice-department-lgbt-workplace-discrimination-is-allowed-under-civil-rights-law/.

Twelve of these bills range from adoption laws to religious freedom legislation. Of the latter, Mississippi passed the “Protecting Freedom of Conscience from Government Discrimination Act,” which allows state employees and private businesses to deny service to LGBTQ individuals based on religious objections.²⁸

American Values at Odds: Freedom of Religion versus Freedom from Discrimination

The collision of two core American values, freedom of religion and freedom from discrimination, is not a new concept.²⁹ Historically, anti-discrimination progress and laws have involved tension with rights to freedom of association, religion and expression,³⁰ and religious freedom was often cited as justification for maintaining inequality.³¹ Religious arguments commonly used today against LGBTQ equality have also been used previously in opposition of the abolition of slavery, women’s suffrage and equality, racial integration, inter-racial marriage and immigration, among others.³² At present though, concern is mounting that religious freedom is being weaponized yet again in civil liberties debates,

²⁸ Moreau, Julie. “129 Anti-LGBTQ State Bills Were Introduced in 2017, New Report Says.” *NBCNews.com*, NBCUniversal News Group, 12 Jan. 2018, www.nbcnews.com/feature/nbc-out/129-anti-lgbtq-state-bills-were-introduced-2017-new-report-n837076.

²⁹ Gjelten, Tom. “In Religious Freedom Debate, 2 American Values Clash.” *NPR*, NPR, 28 Feb. 2017, www.npr.org/2017/02/28/517092031/in-religious-freedom-debate-2-american-values-clash.

³⁰ McArdle, Megan. “The Tension between Anti-Discrimination Laws and Freedom of Religion.” *The Washington Post*, WP Company, 6 June 2018, www.washingtonpost.com/blogs/post-partisan/wp/2018/06/06/the-tension-between-anti-discrimination-laws-and-freedom-of-religion/?utm_term=.767f91a3fe1d.

³¹ “Religious Discrimination and Racism: It’s Not Old News.” *Public Rights Private Conscience Project*, 22 Aug. 2014, blogs.law.columbia.edu/publicrightsprivateconscience/2014/08/22/religious-discrimination-and-racism-its-not-old-news/.

³² *Striking a Balance: Advancing Civil and Human Rights While Preserving Religious Liberty*. The Leadership Conference Education Fund, Mar. 2016. <http://civilrightsdocs.info/pdf/reports/Striking-A-Balance.pdf>

such as *Masterpiece Cakeshop Ltd. V. Colorado Civil Rights Commission*, due to the cultural and constitutional weight it carries.³³

Since the first settlements of the 17th century, religious liberty and a thriving religious culture have been defining attributes of the U.S. Proponents of the religious liberty argument cite that freedom of religion is a cornerstone of the American experiment and that religious faith is not just a “toleration.” Instead, it is understood to be the exercise of “inherent natural rights.”³⁴ The crux of the matter, however, is how religious liberty is rooted within the Constitution itself.

The Heritage Foundation finds that today’s interpretation of the First Amendment, or, as paraphrased by Thomas Jefferson, the “separation of church and state,” does not reflect the viewpoints of the country’s founders.³⁵ According to Jennifer Marshall, a vice president of the Heritage Foundation, “Many think this means a radical separation of religion and politics...That is incorrect: Jefferson wanted to protect states’ freedom of religion from federal government control and religious groups’ freedom to tend to their internal matters of faith and practice without government interference generally.” According to the Heritage Foundation’s analysis, the American model of religious liberty requires a strongly positive view on religious practice in both private and public environments. “While it does not mean that anything and everything done in the name of religious liberty is not subject

³³ Wenger, Tisa. “Discriminating in the Name of Religion? Segregationists and Slaveholders Did It, Too.” *The Washington Post*, WP Company, 5 Dec. 2017, www.washingtonpost.com/news/made-by-history/wp/2017/12/05/discriminating-in-the-name-of-religion-segregationists-and-slaveholders-did-it-too/?utm_term=.3aa27316f081.

³⁴ Marshall, Jennifer A. “Why Does Religious Freedom Matter?” The Heritage Foundation, www.heritage.org/religious-liberty/report/why-does-religious-freedom-matter#_ftn1.

³⁵ Dreisbach, Daniel L. *Thomas Jefferson and the Wall of Separation between Church and State*. New York University Press, 2003; Marshall, Jennifer A. “Why Does Religious Freedom Matter?” The Heritage Foundation, www.heritage.org/religious-liberty/report/why-does-religious-freedom-matter#_ftn1.

to the rule of law, it does mean that the law ought to make as much room as possible for the practice of religious faith.”³⁶

With religious liberty becoming a conservative rallying cry, it is important to note that rhetoric such as this has only increased since the *Obergefell v. Hodges* ruling. It now serves as an excuse to refuse service to LGBTQ persons, as well as women and other minority groups, throughout the U.S.³⁷ Resultantly, numerous states have considered, and at least eight states have enacted, new laws that permit infringement on the rights of LGBTQ individuals and their families.

Human Rights Watch reported in February 2018 that the rash of new “religious exemption” laws passed by state legislatures represents an assault against the rights of LGBTQ persons and should be repealed. Specifically, the organization decreed that the absence of robust non-discrimination protections allows laws to function as a license to discriminate. Further, they create blanket exemptions, instead of being good faith attempts to protect religious liberty and LGBTQ individuals.³⁸

When two constitutional rights collide, one always wins out over the other.³⁹ The question remains as to which one. In the discrimination context, two laws that protect the same

³⁶ Marshall, Jennifer A. “Why Does Religious Freedom Matter?” The Heritage Foundation, www.heritage.org/religious-liberty/report/why-does-religious-freedom-matter#_ftn1.

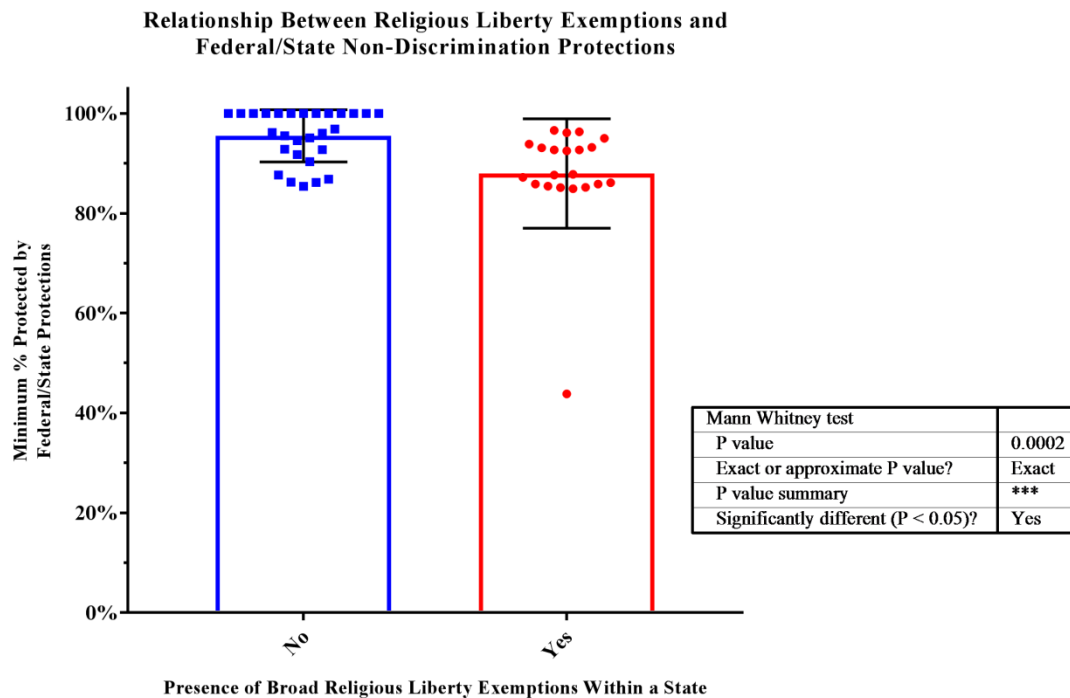
³⁷ Thoreson, Ryan. “Recognizing Religious Freedom as an LGBT Issue.” *The Hill*, The Hill, 12 June 2018, thehill.com/opinion/civil-rights/390540-recognizing-religious-freedom-as-an-lgbt-issue; “United States: State Laws Threaten LGBT Equality.” *Human Rights Watch*, 19 Feb. 2018, www.hrw.org/news/2018/02/19/united-states-state-laws-threaten-lgbt-equality.

³⁸ “‘All We Want Is Equality’ | Religious Exemptions and Discrimination against LGBT People in the United States.” *Human Rights Watch*, 8 Mar. 2018, www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people.

³⁹ Weinstein, Paul. “Public Policy Evaluation and the Policy Process Lecture.” 25 Sept. 2018, Washington, DC.

personal characteristic are not always created equal.⁴⁰ Independent analysis, as noted in Figure 1, confirms a statistically significant relationship between state religious liberty exemption laws and the minimum percent of employees protected by federal and/or state non-discrimination policies. Momentum galvanized the freedom of religion argument to be the de facto response to LGBTQ equity claims; however, there are potential policy options that could significantly weaken this trajectory and reroute the status quo to one championing the civil rights of LGBTQ citizens.⁴¹

Figure 1: The Relationship between Religious Liberty Exemption Laws and Federal and State Non-Discrimination Protections⁴²



⁴⁰ Shinall, Jennifer Bennett. “Less Is More: Procedural Efficacy in Vindicating Civil Rights.” *Alabama Law Review*, *Forthcoming*, 2016, doi:https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2396667.

⁴¹ “Discrimination Claims - State Laws.” *Workplace Fairness*, <http://www.workplacefairness.org>, www.workplacefairness.org/minimum; “Non-Discrimination Laws.” *Movement Advancement Project*, www.lgbtmap.org/equality-maps/non_discrimination_laws; “Religious Exemptions.” *Movement Advancement Project*, <http://www.lgbtmap.org/religious-exemptions>; “State Maps of Laws & Policies: Employment.” *Human Rights Campaign*, www.hrc.org/state-maps/employment; “SUSB Historical Data: US and States 2007-2015 Totals.” *United States Census Bureau*, www.census.gov/data/tables/time-series/econ/susb/susb-historical.html.

⁴² *Ibid.*

Policy Proposal

Supporting existing and upcoming federal legislatures to promote the expansion of civil rights to protect the LGBTQ community is the most comprehensive avenue to pursue. Existing legislation referred to as the Equality Act was introduced subsequent *Obergefell v. Hodges* in both houses of Congress and is presently known as S. 1006 - Equality Act to the 115th Congress.⁴³ The most recent iteration was introduced in May 2017, and the bill proposes amending the Civil Rights Act of 1964 to include sex, sexual orientation and gender identity among the prohibited categories of discrimination or segregation in places of public accommodation.⁴⁴

Currently, the Equality Act legislation is stalled. The last action occurred in May 2017 when the bill was referred to the Committee on the Judiciary. With the 115th Congress ending in early January 2019, the window for support is narrowing. However, Democrats plan to resubmit the bill at the beginning of the 116th Congress.⁴⁵ Civil rights coverage would undeniably expand through the Equality Act, but due to one key aspect that is noted in the following clause, this coverage would not be inclusive to all. “The bill prohibits employers with 15 or more employees from discriminating based on sexual orientation or gender identity, subject to the same exceptions and conditions that currently apply to unlawful employment practices based on race, color, religion, sex, or national origin.

⁴³ “S.1006 - 115th Congress (2017-2018): Equality Act.” *Congress.gov*, www.congress.gov/bill/115th-congress/senate-bill/1006; “The Equality Act: Federal Anti-LGBTQ Discrimination Law Introduced in Congress.” *HR Legalist*, 24 July 2015, www.hrlegalist.com/2015/07/the-equality-act-federal-anti-lgbtq-discrimination-law-introduced-in-congress/.

⁴⁴ “S.1006 - 115th Congress (2017-2018): Equality Act.” *Congress.gov*, www.congress.gov/bill/115th-congress/senate-bill/1006.

⁴⁵ Linderman, Juliet. “House Democrats Promise Action on LGBTQ Rights Bill.” *AP News*, Associated Press, 29 Oct. 2018, www.apnews.com/d2a837b6b11142348ce8ab24e4bccfbd.

Employers must recognize individuals in accordance with their gender identity if sex is a bona fide occupational qualification that is reasonably necessary to the normal operation of that particular business or enterprise.”⁴⁶

The definition for the term “employer” is explicitly problematic for civil rights expansions. Ultimately, the Equality Act, just as the Civil Rights Act of 1964, defines an employer to mean a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar years.⁴⁷ Such language offers, and will continue to offer, loopholes for employers with fewer than 15 employees. Federal anti-discrimination laws are inherently designed to protect people in the workplace from undue discrimination; however, key language does not protect all employees, leaving minorities without adequate protections.

The two policy options to be evaluated require support of the next iteration of the Equality Act that will be introduced to the Senate at the start of the 116th Session. The first option is unconditional support of the bill. The second option is support of the bill with a proposed amendment to bar all employers, regardless of company size or number of individuals employed, from discriminating against employees, while also ensuring the Equal Employment Opportunity Commission (EEOC) receives funding increases to offset a potential influx of employee complaints and lawsuits. This amendment would specifically address current law based upon the language authorized in Title VII of the Civil Rights Act

⁴⁶ “S.1006 - 115th Congress (2017-2018): Equality Act.” *Congress.gov*, www.congress.gov/bill/115th-congress/senate-bill/1006.

⁴⁷ “Title VII of the Civil Rights Act of 1964.” *US Equal Employment Opportunity Commission*, www.eeoc.gov/laws/statutes/titlevii.cfm.

of 1964 and would ameliorate the civil rights imbalance that exists presently within the U.S., allowing for funding to properly process the statute.⁴⁸

Policy Analysis

Option 1: Examining the Equality Act

The passage of the Equality Act would have widespread positive implications on the LGBTQ community. Specifically, it would provide for explicit non-discrimination protections for LGBTQ persons in key areas of life, inclusive of employment, housing, credit, education, public spaces and services, federally funded programs and jury service. The Equality Act would amend existing civil rights law, such as the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act and the Jury Selection and Services Act, along with several laws regarding employment with the federal government, to include sexual orientation and gender identity as protected characteristics. This legislation would also amend the Civil Rights Act of 1964 to prohibit discrimination in public spaces and services, as well as federally funded programs on the basis of sex. The Equality Act would correspondingly update the public spaces and services covered in current law to include retail stores along with banking, legal and transportation services.⁴⁹

Far more comprehensive protections would be ensured, since there is no present-day federally authorized protection statute. While the piecemeal approach to protecting LGBTQ workers means that a large number of people are protected in some form, it is not

⁴⁸ “Small Business Requirements.” *US Equal Employment Opportunity Commission*, www.eeoc.gov/employers/smallbusiness/requirements.cfm.

⁴⁹ “The Equality Act.” *Human Rights Campaign*, www.hrc.org/resources/the-equality-act.

comprehensive, and the majority of states do not offer protections.⁵⁰ Seventeen states have absolutely zero workplace protections afforded to LGBTQ persons.⁵¹ Additionally, housing protections are not universally afforded. Twenty-nine states have no housing protections guaranteed to LGBTQ residents. The Equality Act would not only change this but would ensure national adherence to credit non-discrimination protections that would apply to both sexual orientation and gender identity.⁵²

The Equality Act would also benefit other previously protected classes, including women and people of color. Under the current Civil Rights Act, people of color are protected from discrimination in public accommodations, such as hotels, restaurants and theaters, but not necessarily other businesses. The Equality Act, however, would seek to amend this and would expand the definition of public accommodations. The Equality Act would likewise afford women more protection, as presently women and LGBTQ individuals have no federal protections with respect to public accommodations and unfair retail practices. The Equality Act would eliminate this and would specifically prohibit discrimination based on sex and sexual orientation in public accommodations and federal financial assistance.⁵³

While the Equality Act would extend protections, it would not provide for more comprehensive workplace protections for any class. The 15-person employee threshold

⁵⁰ Cohen, David S. “How Is It Still Legal to Fire Someone for Being Gay?” *Rolling Stone*, Rolling Stone, 26 Feb. 2018, www.rollingstone.com/politics/politics-news/how-is-it-still-legal-to-fire-someone-for-being-gay-253661/.

⁵¹ “State Maps of Laws & Policies: Employment.” *Human Rights Campaign*, www.hrc.org/state-maps/employment.

⁵² “Non-Discrimination Laws.” *Movement Advancement Project*, www.lgbtmap.org/equality-maps/non_discrimination_laws; “State Maps of Laws & Policies: Housing.” *Human Rights Campaign*, www.hrc.org/state-maps/housing.

⁵³ Holter, Lauren. “5 Reasons America Really Needs The Equality Act.” *Bustle*, Bustle, 27 July 2015, www.bustle.com/articles/100127-5-reasons-the-equality-act-is-absolutely-crucial-to-the-future-of-the-united-states.

would still stand, leaving many Americans without legal protection. This brings to attention more detailed analysis and understanding of the policy implications brought forth by Title VII of the 1964 Civil Rights Act. Understanding the history for employee minimums at both the federal and the local levels, along with the sweeping impacts of the policy at present, is necessary to better assess the second policy option of supporting the Equality Act with a required amendment to provide for the elimination of the 15-person employee minimum and the assurance of adequate EEOC funding, which would enable the U.S.’ ability to uphold the legislation upon it becoming law.

Option 2: Supporting the Equality Act with Requisite Conditions

Two points are in need of acknowledgement before furthering the discussion. First, this particular policy proposal is not widespread and has yet to garner national attention, and upon the efforts of Illinois to reduce its state policy on employee thresholds for Title VII protections, which will subsequently be discussed, it was noted by lawmakers that they had no idea this problem even existed throughout the U.S.⁵⁴ Second, because of the lack of national attention, there is an impossibly low volume of analysis on potential ramifications for altering the 15-employee minimum threshold. Consequently, in order to fully examine the proposed policy, analysis will focus on achieving equity as viewed by the spirit of the Equality Act's overall goal of achieving fairness within the US at large. Additional analysis as to Title VII's failings and even the origin of the employee threshold will follow.

⁵⁴ “Rauner Vetoes Bill to Extend Anti-Discrimination Laws to Small Employers.” *Capitol Fax.com - Your Illinois News Radar*, 13 Aug. 2018, capitolfax.com/2018/08/13/rauner-vetoes-bill-to-extend-anti-discrimination-laws-to-small-employers/; Underwood, Angela. “Employment Discrimination Bill Seen as Necessary by Some, Burdensome by Others.” *Prairie State Wire*, 2 Aug. 2018, prairiestatewire.com/stories/511507843-employment-discrimination-bill-seen-as-necessary-by-some-burdensome-by-others.

Title VII was implemented to enhance equity but not to achieve it universally throughout the U.S. Upon initial debate on Title VII, as per the Congressional record, the issue of employee thresholds was discussed but was regarded with little to no bearing and received no consequential debate. At the time, senators estimated that approximately 25 percent of the U.S. workforce, nearly 18.5 million workers, would be excluded from coverage. There was considerable concern that extending the Civil Rights Act to small businesses would actually increase the bitterness, hatred and violence,⁵⁵ which seemed to many as contrary to the proposed legislation's intended goal.

Although the messaging surrounding Title VII is one of advancement, the fine print is that Congress knowingly passed legislation that alluded to comprehensive reforms for protected classes and purposely failed to protect nearly 25 percent of these workers. This is legislative malpractice and purports a narrative deeply countering the stark realities of the law and ought to be rectified due to reasons steeped in both precedent and morality.

Analogous legislation misnomers have existed throughout U.S. history. Upon the country's founding, it was proclaimed that all men were created equal, yet there were caveats. Exclusion applied to a significant number of the country's populace at the time and specifically barred most African Americans, Native Americans, women, men who had not attained their majority and white males who did not own land from voting in elections that would eventually influence the country's laws, which directly impacted these excluded groups. It can therefore be seen that equity was pronounced early in American history, but

⁵⁵ Lewallen, Daniel. "Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes." *Indiana Law Review*, vol. 47, no. 817, pp. 817-841.

in reality, this was not the case. However, some efforts to correct these imbalances have occurred with time.

Pursuing the removal of employee threshold requirements to the Equality Act and all relevant law surrounding Title VII would serve to correct the mistakes that are inherent from previous Congresses and would be well to bear in mind not just from a moral imperative but because equality is an American value. There also is precedent, as amendments and more inclusive policy reforms have sought over the years to correct the initial shortcomings of the Declaration of Independence and have actively worked to achieve the American tenant of equality for all.

Later, in 1972, the issue received more light, and Congress considered lowering the federal minimum employee threshold from 25 to 8. While a compromise of 15 was reached, one study, authored by economist Kenneth Chay, explored the impact of the 1972 threshold shift from 25 to 15 on employment and earnings of African American workers in the South.⁵⁶ Chay concluded that the amendment lowering the federal threshold positively impacted the employment and earnings of African American workers, particularly in certain industries with companies that had not previously been subject to Title VII.⁵⁷ Adopting no employee minimum thresholds would allow for further progress to workers traditionally earning less than the average white male and could generate similar economic earnings.

⁵⁶ Chay, Kenneth Y. “The Impact of Federal Civil Rights Policy on Black Economic Progress: Evidence from the Equal Employment Opportunity Act of 1972.” *Industrial and Labor Relations Review*, vol. 51, no. 4, 1998, pp. 608–632. *JSTOR*, JSTOR, www.jstor.org/stable/2525011.

⁵⁷ Lewallen, Daniel. “Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes.” *Indiana Law Review*, vol. 47, no. 817, pp. 817-841.

Figure 2: Visualization of Regional Non-Discrimination Protections⁵⁸

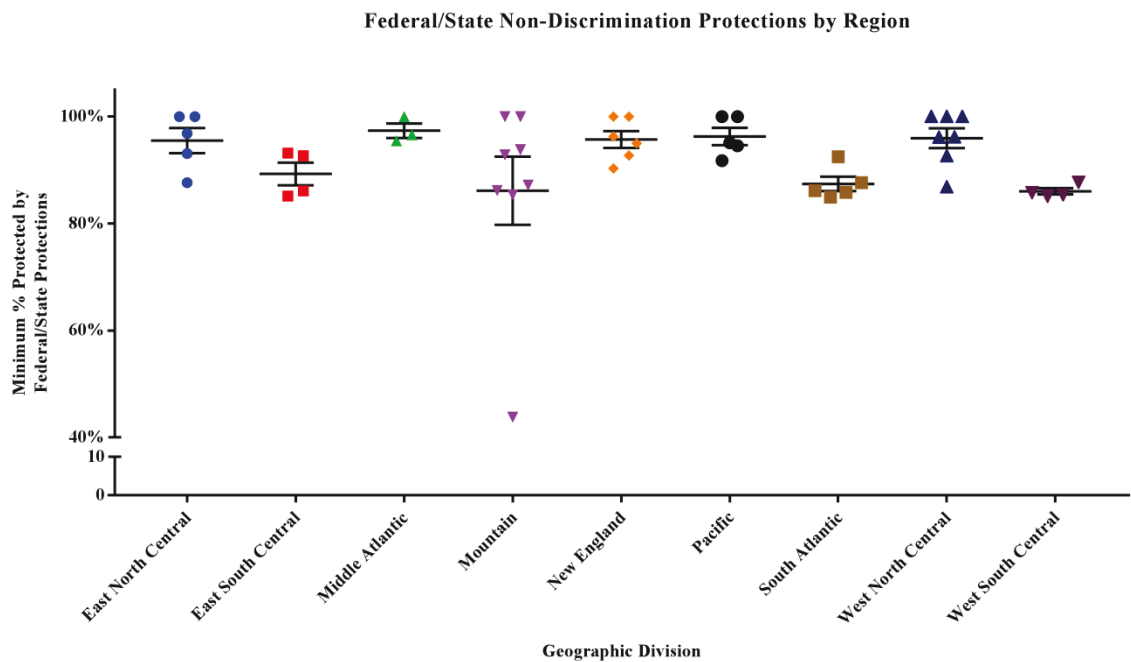


Figure 2 furthers this point, illustrating variance in the minimum percentage of employees covered per state across the country’s geographic divisions, as recognized per the U.S. Census. While most all states have applied employee non-discrimination protections to at least 75 percent of employees, there are trends to explore. Most notably, as seen by Table 1, are the low standard deviations for both the Middle Atlantic and the West South Central regions, although the Middle Atlantic has the highest regional average and the West South Central has the lowest regional average.⁵⁹

⁵⁸ “Discrimination Claims - State Laws.” *Workplace Fairness*, //Www.workplacefairness.org, www.workplacefairness.org/minimum; “Non-Discrimination Laws.” *Movement Advancement Project*, www.lgbtmap.org/equality-maps/non_discrimination_laws; “State Maps of Laws & Policies: Employment.” *Human Rights Campaign*, www.hrc.org/state-maps/employment; “SUSB Historical Data: US and States 2007-2015 Totals .” *United States Census Bureau*, Census.gov, www.census.gov/data/tables/time-series/econ/susb/susb-historical.html.

⁵⁹ Ibid.

Table 1: Regional Summary of Federal and State Non-Discrimination Protections⁶⁰

Summary: Federal/State Non-Discrimination Protections by Region			
Geographic Division	States Comprised	Mean	Standard Deviation
Middle Atlantic	New Jersey, New York, Pennsylvania	97.38%	2.34
Pacific	Alaska, California, Hawaii, Oregon, Washington	96.29%	3.62
West North Central	Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota	95.98%	4.88
New England	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	95.73%	3.89
East North Central	Illinois, Indiana, Michigan, Ohio, Wisconsin	95.53%	5.23
South Atlantic	Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia	90.45%	5.84
East South Central	Alabama, Kentucky, Mississippi, Tennessee	89.30%	4.24
Mountain	Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming	86.16%	18.05
West South Central	Arkansas, Louisiana, Oklahoma, Texas	86.06%	1.19

During the 1972 Congressional discussion, opposition to lowering the employee threshold emerged on the national stage. Senator “Sam” Ervin of North Carolina expressed concern regarding the burden that a minimum employee threshold might put on small businesses. Senator Paul Fannin of Arizona also expressed similar apprehensions, emphasizing the potential costs businesses would be forced to incur through the adherence of these federal employment regulations.

In short, there is only one overarching argument to preclude this paper's second policy proposal linked to eliminating the employee threshold, which is the protection of small businesses from federal regulation.⁶¹ Scholars and courts have further narrowed this small

⁶⁰ Ibid.

⁶¹ Lewallen, Daniel. “Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes.” *Indiana Law Review*, vol. 47, no. 817, pp. 817-841.

business protection proclivity for the following reasons: to protect small businesses from the high cost of complying with complex federal employment law,⁶² to protect the associational interests of small businesses⁶³ and to protect business from the potential high costs that are interrelated with litigating a federal lawsuit. Congress reiterated this principle by stating, "Title VII already addresses the unique needs of small businesses by exempting employers with fewer than 15 employees."⁶⁴

While the risk to business is important to weigh, accounting for the needs of employees is equally significant. Workers employed by small businesses are in need of anti-discrimination statutes, especially since small businesses employ a significant portion of the population.⁶⁵ There are also certain features of small businesses that potentially make harassment go unpunished or make the effects of harassment more salient. The economy, especially in its recovery from the Great Recession, created an environment where employees could work in a workplace ripe with harassment but not have the option to seek employment elsewhere.⁶⁶

While it can be argued that small businesses do not have the means to combat harassment litigation, they nevertheless breed workplace misconduct. Small businesses are less likely to have formal written procedures to safeguard against discrimination,⁶⁷ and the

⁶² Court of Appeals, 7th Circuit. *Papa v. Katy Industries, Inc.*, 166 F. 3d 937. 8 Feb. 1999.

⁶³ US District Court for the Northern District of Illinois. *Jendusa v. Cancer Treatment Centers of America, Inc.* 2 Nov. 1994.

⁶⁴ Lewallen, Daniel. "Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes." *Indiana Law Review*, vol. 47, no. 817, pp. 817-841.

⁶⁵ "SUSB Historical Data: US and States 2007-2015 Totals ." *United States Census Bureau*, Census.gov, www.census.gov/data/tables/time-series/econ/susb/susb-historical.html.

⁶⁶ Lewallen, Daniel. "Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes." *Indiana Law Review*, vol. 47, no. 817, pp. 817-841.

⁶⁷ Hemken, David, editor. "Twelfth Annual Review of Gender and Sexuality Law: Employment Law and Health Care Access Chapter: State Regulation of Sexual Harassment." *The Georgetown Journal of Gender and the Law*, XII, no. III, 2011, p. 650.

introduction of strong anti-harassment policies would likely curb the probability of this type of behavior in the future.⁶⁸ One element that is strikingly different between larger workplaces and small businesses is the work environment. By and large, small businesses tend to be less formal, which is an indicator associated with increased harassment. Some of these businesses can function as families, which can cause employees to overlook inappropriate behavior. One employment lawyer appraised the situation, saying, “Many times, owners or managers see their businesses as their own personal fiefdoms and they don’t think the laws apply to them.”⁶⁹ This is true depending on the size of the business and the state in which the business resides.⁷⁰

Although federal anti-discrimination law applies only to workplaces with at least 15 employees, many states have anti-discrimination laws already in place to cover workplaces that employ fewer than 15 individuals, which is further illustrated in Table 2. Approximately 24 percent of states, inclusive of D.C., do not require a minimum employee threshold for the application of Title VII protections, and nearly 65 percent of states ascertain employers have a lower minimum than the federally placed 15 or plus standard.⁷¹

⁶⁸ Vitell, Scott J., et al. “Ethical Problems, Conflicts and Beliefs of Small Business Professionals.” *Journal of Business Ethics*, vol. 28, no. 1, 2000, pp. 15–24. JSTOR, JSTOR, www.jstor.org/stable/25074396.

⁶⁹ Wolinsky, David. “How Sexual Harassment Affects Small Businesses.” *NBC Chicago*, NBC Chicago, 13 Oct. 2011, www.nbcchicago.com/blogs/inc-well/How-Sexual-Harassment-Affects-Small-Businesses-131214864.html.

⁷⁰ “Discrimination Claims - State Laws.” *Workplace Fairness*, //Www.workplacefairness.org, www.workplacefairness.org/minimum.

⁷¹ Ibid.

Table 2: Minimum Employee Threshold Requirements at the State Level⁷²

Employee Threshold Numbers at the State Level			
Policy	Details	States Impacted	Totals
No Minimum	<i>State law requires no minimum number of employees</i>	District of Columbia, Hawaii, Maine, Michigan, Minnesota, Montana, New Jersey, North Dakota, South Dakota, Vermont, Wisconsin	11 states & D.C.
2 or More	<i>State law requires a minimum of 2 employees</i>	Alaska, Wyoming	2 states
3 or More	<i>State law requires a minimum of 3 employees</i>	Connecticut	1 state
4 or More	<i>State law requires a minimum of 4 employees</i>	Delaware, Iowa, New Mexico, New York, Ohio, Pennsylvania, Rhode Island	7 states
5 or More	<i>State law requires a minimum of 5 employees</i>	California, Idaho, Kansas	3 states
6 or More	<i>State law requires a minimum of 6 employees</i>	Indiana, Massachusetts, Missouri, New Hampshire, Virginia	5 states
8 or More	<i>State law requires a minimum of 8 employees</i>	Kentucky, Tennessee, Washington	3 states
15 or More	<i>Either state law stipulates 15 or more employees or no state law exists, rendering the federal standard of 15 or more employees</i>	Maryland, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Mississippi, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, Texas, Utah, West Virginia, Louisiana	18 states

Removal of the minimum federal employee threshold would promote workplace equity throughout the country regardless of local business jurisdiction and would no longer place the burden on the employee residing in a state without protection laws in place. No loopholes would exist, and arguably, this would be advantageous to commonly discriminated individuals, including the LGBTQ community, African Americans, women and others.

The minimum employee threshold was not essential to the original passage of Title VII, but removing it from federal anti-discrimination statutes today could lead to constitutional

⁷² Ibid.

concerns. *United States v. Lopez* limited congressional power under the Commerce Clause in 1995⁷³ and led to an erosion in Congressional commerce-related oversight. Section 5 of the Fourteenth Amendment also limits Congressional ability to pass federal anti-discrimination laws, as these were measures enacted to prevent the potential development of a generalized federal police power.⁷⁴

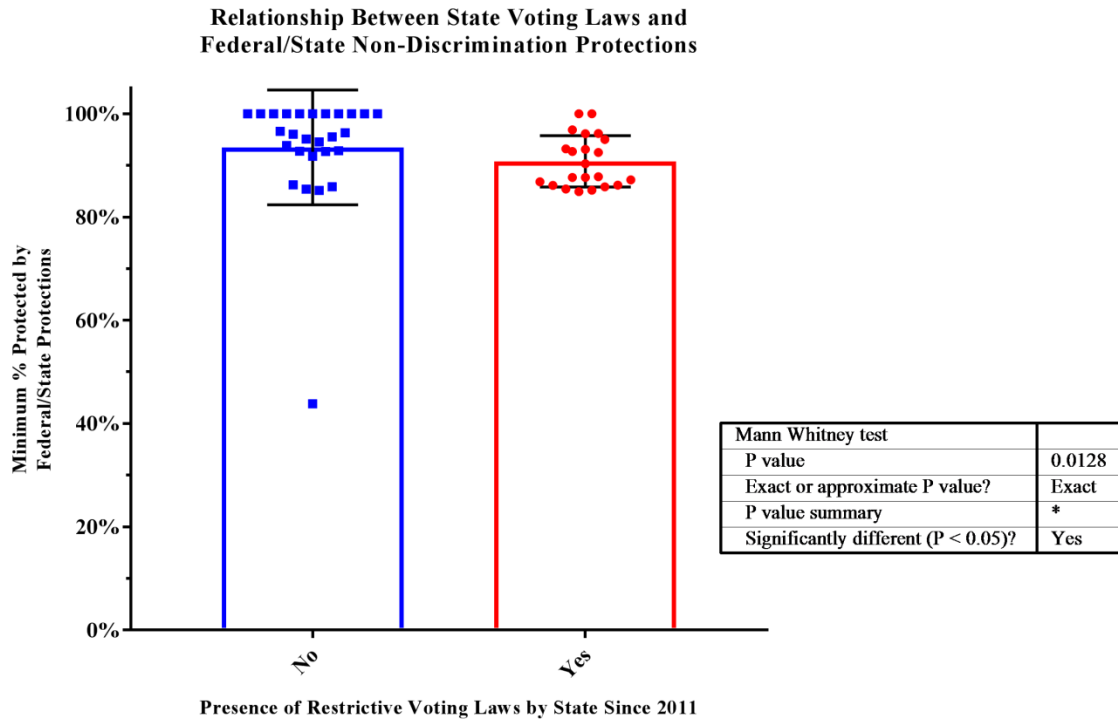
States can enforce the removal of employee thresholds as these two statutes do not apply to them. This, while a step in the right direction, will still only favor those in states willing to make the transition. Hypothetically, any state can elect legislators more likely to pass no employee threshold minimum legislation. The problem, however, is that there is a statistically significant relationship between states requiring a higher number of employees for workplace protections and states passing voter suppression legislation, which is further illustrated in Figure 3.⁷⁵

⁷³ *United States v. Lopez*, 514 U.S. 549. April 1995; see also *United States v. Morrison*, 529 U.S. 598. May 2000.

⁷⁴ Post, Robert C., and Reva B. Siegel. "Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel." *The Yale Law Journal*, vol. 110, no. 3, 2000, pp. 506–507. JSTOR, JSTOR, www.jstor.org/stable/797522.

⁷⁵ "Discrimination Claims - State Laws." *Workplace Fairness*, [//www.workplacefairness.org](http://www.workplacefairness.org), www.workplacefairness.org/minimum; "Non-Discrimination Laws." *Movement Advancement Project*, www.lgbtmap.org/equality-maps/non_discrimination_laws; "State Maps of Laws & Policies: Employment." *Human Rights Campaign*, www.hrc.org/state-maps/employment; "SUSB Historical Data: US and States 2007-2015 Totals ." *United States Census Bureau*, Census.gov, www.census.gov/data/tables/time-series/econ/susb/susb-historical.html; Weiser, Wendy, and Max Feldman. "The State of Voting 2018." *The Brennan Center for Justice*, The Brennan Center for Justice, 5 June 2018, www.brennancenter.org/publication/state-voting-2018.

Figure 3: The Relationship between State Voting Laws and Federal and State Non-Discrimination Protections⁷⁶



Since 2010, more than 72 percent of states enforcing the 15-employee minimum threshold passed voter restriction legislation, but less than 19 percent of states with no employee minimums passed voter restrictions.⁷⁷ In states more truncated in their views of limited democracies along with institutionalized homophobia, racism and sexism, it would be an uphill struggle to eliminate employee minimum thresholds within even the next few years. Hope for change such as this in states with entrenched discrimination would instead be a matter of decades, and a timeframe such as this extends employee vulnerability. The burden to fight discrimination is placed predominantly on workers who have been discriminated

⁷⁶ Ibid.

⁷⁷ “New Voting Restrictions in America.” *Brennan Center for Justice*, www.brennancenter.org/new-voting-restrictions-america.

against, and they must first uncover the discrimination and next file a complaint and/or lawsuit themselves.⁷⁸

Assuming Congress can meet any constitutional barriers, removing the employee minimum threshold would add to an already over-burdened EEOC workload.⁷⁹ In the 1972 discussion regarding change of the threshold from 15 to eight, the minority report of the House Committee on Education and Labor states that “figures projected for the extension of Title VII jurisdiction to include all persons employed in establishments which employ eight or more full time employees have been derived from a projected 25 percent increase in the Commission’s workload due to extended coverages.”⁸⁰ Since then, EEOC staffing levels have dropped significantly, with nearly a 30 percent reduction between 2000 and 2008. The number of discrimination charges has only increased with time. The EEOC faces a growing backlog of unresolved discrimination charges,⁸¹ and the number of businesses that would have to adhere to Title VII should the minimum employee threshold be removed would triple, aggravating a system that has already reached its capacity.⁸²

Removing the employee threshold would increase complaints to the EEOC. The EEOC has seen a massive influx of complaints with the emergence of the #MeToo movement, and callers to the EEOC hotline can experience significant wait times. Additionally, the average

⁷⁸ Cohen, Philip. “A Simple, Legal Way to Help Stop Employment Discrimination.” *The Atlantic*, Atlantic Media Company, 1 Apr. 2013, www.theatlantic.com/sexes/archive/2013/04/a-simple-legal-way-to-help-stop-employment-discrimination/274519/.

⁷⁹ “US Equal Employment Opportunity Commission Fiscal Year 2012 Congressional Budget Justification.” *US Equal Employment Opportunity Commission*, Feb. 2011, www.eeoc.gov/eeoc/plan/2012budget.cfm.

⁸⁰ Lewallen, Daniel. “Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes.” *Indiana Law Review*, vol. 47, no. 817, pp. 817-841.

⁸¹ “US Equal Employment Opportunity Commission Fiscal Year 2012 Congressional Budget Justification.” *US Equal Employment Opportunity Commission*, Feb. 2011, www.eeoc.gov/eeoc/plan/2012budget.cfm.

⁸² Lewallen, Daniel. “Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Statutes.” *Indiana Law Review*, vol. 47, no. 817, pp. 817-841.

processing delay is more than ten months.⁸³ In March 2018, the EEOC saw its first budget increase in eight years, and Congress added more than \$15 million to fight workplace discrimination and harassment. With momentum trending in the direction of quelling discrimination, it is likely that future budgets will include increases to the EEOC, especially since the House will soon be controlled by Democrats, who analysts believe are very much bought into the idea of workplace equity.⁸⁴

Political Analysis

Option 1: Assessing the Equality Act Through the Lens of Identity Politics

In furthering discussion of Congress and democratically held inclination to further equity, it is essential to assess the two policy options through a comprehensive political analysis. To the first option, sole support of the next iteration of the Equality Act, there is bipartisan support. The Public Religion Institute (PRRI) noted that nationally, support for a bill akin to the Equality Act topped 70 percent approval, and approximately one-third *strongly* favor laws to protect LGBTQ people against discrimination.⁸⁵

While support for LGBTQ anti-discrimination protection is at the highest point in U.S. history, there are still notable trends to address. These include entrepreneurialism, age, gender, ethnicity, political and religious tendencies. To begin, there is corporate support in

⁸³ “Union: Funding Boost for EEOC Greatly Needed Due to #MeToo Movement.” *FederalSoup*, 26 Mar. 2018, federalsoup.com/articles/2018/03/26/metoo-movement-causes-surge-in-workplace-sexual-harassment-claims-at-understaffed-eeoc.aspx.

⁸⁴ Calfas, Jennifer. “A \$16 Million Win for #MeToo and Time's Up Was Slipped into Trump's Budget.” *Time*, Time, 29 Mar. 2018, time.com/money/5221146/metoo-eeoc-funding-increase/.

⁸⁵ Vandermaas-Peeler, Alex, et al. “Emerging Consensus on LGBT Issues: Findings From the 2017 American Values Atlas.” *PRRI*, www.prri.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas/.

favor of the Equality Act. In September 2017, it was announced that more than 100 corporations publicly support the legislation. The coalition consists of companies in all 50 states and headquarters in 23 states. Their collective revenue is at \$2.6 trillion and collective employment nears 6 million workers; figures such as these further outline the business community's backing of non-discrimination policy.⁸⁶

Younger Americans are more likely to support anti-discrimination legal protections than older Americans. Nearly 80 percent of young adults aged 18-29 favor non-discrimination laws, with nearly half *strongly* favoring them. Among seniors aged 65 and up, more than 60 percent favor non-discrimination protections for the LGBTQ community. Gender differences are modest with respect to non-discrimination protections and represent a gap of only seven percentage points. Seventy-three percent of women support the passage of protection laws to prevent discrimination in jobs, public accommodations and housing. Sixty-five percent of men support similar legislation. There is, however, an intensity gap between the two. Forty percent of women, compared to only 29 percent of men, *strongly* favor LGBTQ non-discrimination protections.⁸⁷

There is no significant variation when examining racial and ethnic lines in support for non-discrimination laws. Sixty-six percent of black Americans favor these protections, as well as 69 percent of Hispanic Americans and 71 percent of white Americans. Asian-Pacific Islander Americans, moreover, have the highest levels of support, with 75 percent in favor.

The gender gap across these racial and ethnic groups is also consistent with the

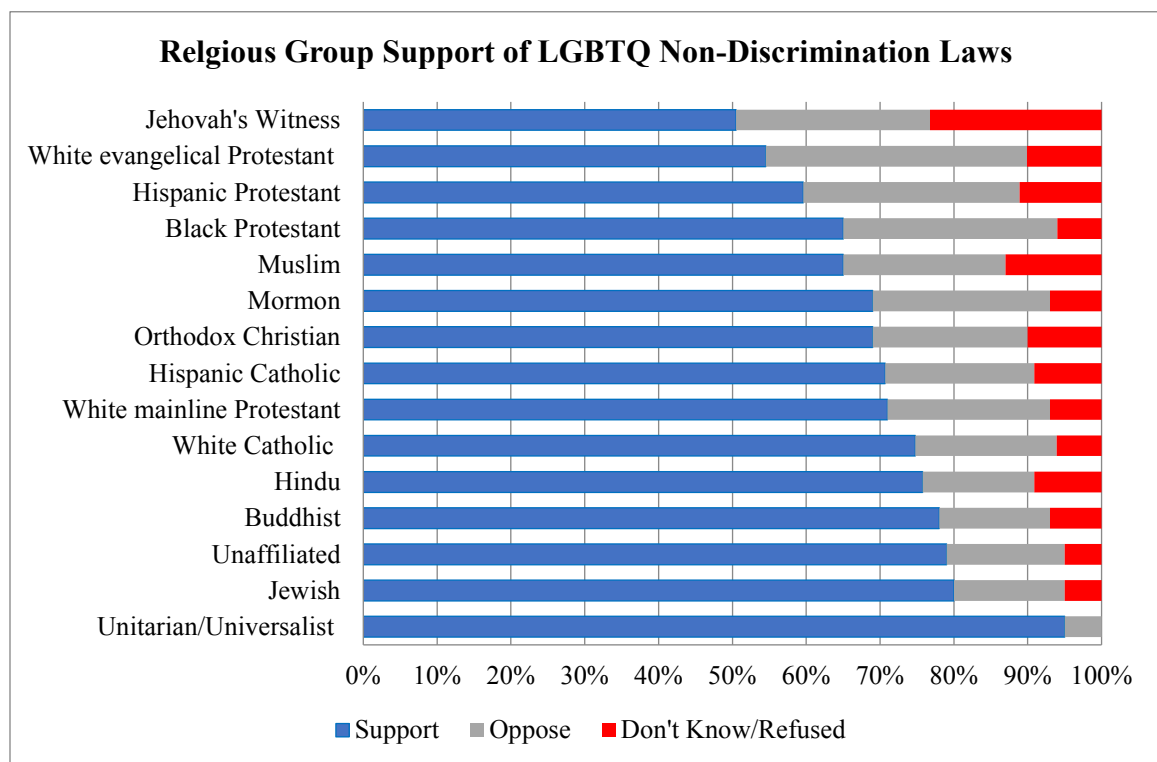
⁸⁶ Opalewski, Kate. "More Than 100 Businesses Support the Equality Act." *Pride Source*, Pride Source, 26 Sept. 2017, pridesource.com/article/83128-2/.

⁸⁷ Vandermaas-Peeler, Alex, et al. "Emerging Consensus on LGBT Issues: Findings From the 2017 American Values Atlas." *PRRI*, www.prri.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas/.

aforementioned gender variation discussion. African American men express the lowest level of support, with Asian-Pacific Islander women expressing the greatest.⁸⁸

Non-discrimination protections for LGBTQ persons are also supported across party lines. Seventy-two percent of Independents and 79 percent of Democrats favor protection policies. Republicans, however, have more varied views. Fifty-six percent of conservative, 68 percent of moderate and 65 percent of liberal Republicans support non-discrimination protections for the LGBTQ community.⁸⁹

Figure 4: Religious Group Support of LGBTQ Non-Discrimination Laws⁹⁰



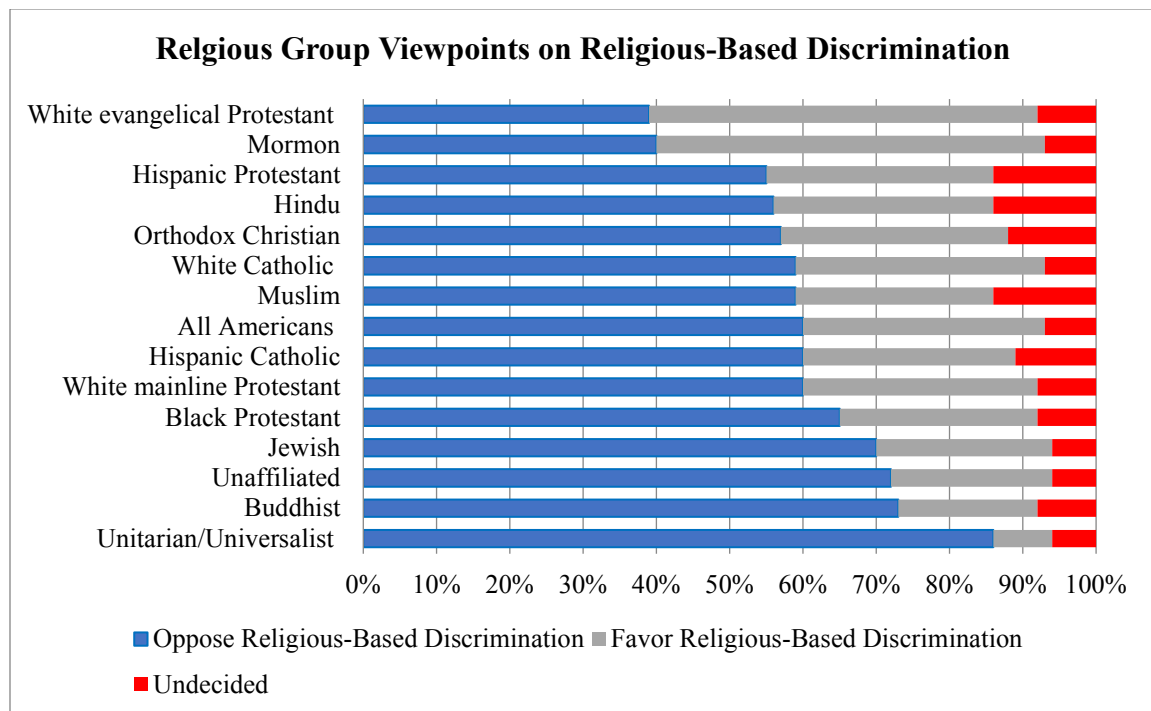
⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

Returning to the confluence of both religious freedom and individual freedom and equality, religious group support, as reflected in Figure 4, depicts overall support of legal protections against the discrimination of LGBTQ Americans. There are obvious differences. Unitarian/Universalist groups are most receptive to non-discrimination legislation, with only five percent opposing. Protestants, Jehovah’s Witness and Mormon groups are least receptive, with approximately 30 percent of Protestant, 26 percent of Jehovah’s Witness and 24 percent of Mormon groups opposing LGBTQ non-discrimination protections. Regardless of religious classification, the trend is resoundingly favorable for enacting of LGBTQ non-discrimination policy.⁹¹

Figure 5: Religious Traditions and Viewpoints on Religious-Based Discrimination⁹²



⁹¹ Ibid.

⁹² Ibid.

In further assessing religious inclination toward LGBTQ non-discrimination, it is important to drawdown as to the optics surrounding recent watershed cases, such as *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. The Trump administration continually propels the freedom of religion argument forward, but most religious groups within the U.S. do not believe small business owners should be allowed to refuse service to gay and lesbian persons on the basis of religious reasons, as is illustrated in Figure 5. Such a generalized belief yields hope as to future norms expelling commonplace religious-based discrimination.⁹³

Sixty percent of all Americans oppose religious-based service refusal. Several religious groups do fall below that baseline national average and include Muslim, White Catholic, Orthodox Christian, Hindu, Hispanic Protestant, Mormon and White Evangelical Protestant groups. Both Mormon and White Evangelical Protestant groups have more than 50 percent of constituents in favor of refusing service due to religious preferences. Equity is rarely achieved entirely at once, and as observed, there are still viewpoints on discrimination that are inharmonious with one another.⁹⁴

In Colorado, such a finding represents a challenge to supporting the Equality Act. While Mormons only comprise two percent of Colorado's religious composition, Evangelical Protestants account for 26 percent⁹⁵ and create the biggest potential impediment to supporting legislation akin to the Equality Act prior to the 2020 Colorado Senate election. This is an element that deserves further study. These two religious factions represent nearly

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ "Religion in America: U.S. Religious Data, Demographics and Statistics." *Pew Research Center's Religion & Public Life Project*, Pew Research Center, www.pewforum.org/religious-landscape-study/state/colorado/.

one third of Colorado’s religious population, with neither group firmly committed to opposition or support. Both White Evangelical Protestants and Mormons support religious-based discrimination by 53 percent, while nearly 40 percent oppose and approximately eight percent remain undecided.⁹⁶

If all undecided voters within these two religious groups shifted views in support of religious-based discrimination, only 40 percent would be likely single-issue voters on LGBTQ rights, and of single-issue voters, LGBTQ rights rank last of fourteen top voting issues.⁹⁷ This suggests a low risk of negative impact to Gardener’s religious constituency.

Additionally, religious-based service refusal varies dramatically by political affiliation, a similarity that mirrors national political views on same-sex marriage. Seventy-six percent of Democrats and 60 percent of Independents oppose religious-based discrimination. Republicans have a narrow majority of 52 percent in favor of religious-based discrimination for business owners, so long as they have the right to refuse products or services to members of the LGBTQ community if providing them would violate their religious beliefs.⁹⁸

⁹⁶ Vandermaas-Peeler, Alex, et al. “Emerging Consensus on LGBT Issues: Findings From the 2017 American Values Atlas.” *PRRI*, www.prii.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas/.

⁹⁷ “Top Voting Issues in 2016 Election.” *Pew Research Center U.S. Politics and Policy*, Pew Research Center for the People and the Press, 7 July 2016, www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election/.

⁹⁸ Vandermaas-Peeler, Alex, et al. “Emerging Consensus on LGBT Issues: Findings From the 2017 American Values Atlas.” *PRRI*, www.prii.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas/.

Option 2: A Case Study on Previous Attempts to Redefine “Employer”

With respect to the second policy proposal, supporting the Equality Act with assurances of amending the definition of employer, analysis on current statewide opinions on the debate, along with a case study, will help to scrutinize potential implications and dissect the viability of such support. There is widespread concern as to the implication of expanding the definition of “employer” to a scope of fewer than 15 employees.

On August 3, 2018, Illinois Governor Bruce Rauner vetoed HB 4572, a bill which provided that “employer” includes any person employing one or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding and serves as a case study for further analysis.⁹⁹ Rauner’s official notice of veto referenced the Illinois Human Rights Act and its ability to prohibit unlawful discrimination in employment within the state of Illinois and its application to employers with 15 or more employees, a threshold mirroring the federal definition of employer in Title VII of the Civil Rights Act, the Americans with Disabilities Act and other anti-discrimination statutes. These provisions and the relationship between human rights protections at the state versus federal level are ordinary, and in 18 states, including Illinois, the state employer threshold equates to that of the federal threshold.

Rauner’s rationale included the following, “This longstanding and well-reasoned threshold balances the need to foster fair, equitable and harassment-free workplaces across the State with the lopsided burden that discrimination claims impose upon small businesses and

⁹⁹ “Bill Status of HB4572.” *Illinois General Assembly*, www.ilga.gov/legislation/billstatus.asp?DocNum=4572&GAID=14&GA=100&DocTypeID=HB&LegID=109500&SessionID=91.

startups, in comparison to large organizations with in-house compliance, human resources, risk management, and litigation defense functions.”¹⁰⁰ HB 4572, moreover, resembles a commonplace struggle within the U.S. workforce and how the government can protect its citizens and still foster innovation through business.

Businesses largely deemed the legislation incorporated with HB 4572 to be bad for the industry. Critics, including the Illinois Chamber of Commerce, the National Federation of Independent Business (NFIB) and the Illinois chapter of the Associated Builders and Contractors Inc., argued that HB 4572 would impose unnecessary burdens on small businesses throughout the state. The Illinois Manufacturers’ Association (IMA) filed a witness slip against the bill, suggesting that a heightened regulatory environment for small businesses would be created by the legislation. This reflects the values debate rising throughout the U.S., specifically that expanding EEOC protections would be unfair to businesses. The IMA referenced that throughout the past few decades, Illinois lawmakers generally exempted small employers from laws that “created costly and burdensome mandates,” which would be enforced had Governor Rauner not vetoed HB 4572.

Others, such as the NFIB, viewed HB 4572 as legislation that would needlessly open up employers to litigation and could adversely impact small business. Stated concerns revolve around the idea that small businesses do not have the human resource infrastructure to stave off litigation. The Illinois State Director of the NFIB said, “The way this is set up, you’re going to see a lot of litigation created against the smallest of the businesses...they’re not

¹⁰⁰ “Rauner Vetoes Bill to Extend Anti-Discrimination Laws to Small Employers.” *Capitol Fax.com - Your Illinois News Radar*, 13 Aug. 2018,.

prepared to be able to deal with this kind of stuff.”¹⁰¹ In an effort to curb litigation, small employers are often encouraged by online sources to assert, as soon as possible, in their defense that they are not subject to suit under Title VII because of their size.¹⁰²

While small business backers largely advocated against HB 4572, labor unions and minority rights advocates supported its passage. Laborers International Union of North America’s Midwest Region Assistant Director of Governmental Affairs, Anna Koeppel, viewed HB 4572 in a positive light, saying that Illinoisans deserve to be treated fairly based on their abilities and qualifications when they go to work. Koeppel furthered, “I urge the governor to sign this legislation to show that in Illinois, we really do believe in equality under the law for everyone. It’s the right thing to do.”¹⁰³

Illinois National Organization for Women President, Michelle Fadeley, stated, “It is unacceptable that discrimination is allowed in tens of thousands of employers across this state. A shocking number of between a quarter million and half million people...that are employed by businesses of fewer than 15 who are vulnerable to discrimination.” Equality Illinois Director of Public Policy, Mike Ziri, also publicly urged for the governor to sign HB 4572 after the bill’s successful passage, saying that it was a manner in which to advance human rights and that there is evident deficiency in current law.¹⁰⁴

¹⁰¹ Underwood, Angela. “Employment Discrimination Bill Seen as Necessary by Some, Burdensome by Others.” *Prairie State Wire*, 2 Aug. 2018, prairiestatewire.com/stories/511507843-employment-discrimination-bill-seen-as-necessary-by-some-burdensome-by-others.

¹⁰² Warner, David S. “Small Employers Beware: The U.S. Supreme Court Has Ruled That Title VII’s Employee-Numerosity Requirement Does Not Determine Jurisdiction.” *Little Mendelson P.C.*, 3 Mar. 2006, www.littler.com/publication-press/publication/small-employers-beware-us-supreme-court-has-ruled-title-viis-employee.

¹⁰³ Underwood, Angela. “Employment Discrimination Bill Seen as Necessary by Some, Burdensome by Others.” *Prairie State Wire*, 2 Aug. 2018, prairiestatewire.com/stories/511507843-employment-discrimination-bill-seen-as-necessary-by-some-burdensome-by-others.

¹⁰⁴ Ibid.

The deficiency in status quo policy, per Ziri, reflects a study reporting that 15 percent of transgender Illinoisans lost a job because of their gender identity or gender expression.¹⁰⁵ The Illinois numbers provided by Ziri closely reflect the national average. According to the 2015 U.S. Transgender Survey Report, the number is closer to 16 percent, or one in six respondents who have ever been employed, reported losing a job because of their gender identity or expression in their lifetime. The same report found that 30 percent of transgender persons who had a job in the past year reported being fired, denied a promotion or experienced some other form of mistreatment related to their gender identity or expression. Similarly, 15 percent reported being verbally harassed, physically attacked and/or sexually assaulted at work because of their gender identity or expression within the previous year alone. With statistics such as these, it is unsurprising that 77 percent of these respondents who had a job in the previous year took steps to avoid mistreatment in the workplace, and such preventative measures included hiding and/or delaying their gender transition or even quitting their job.¹⁰⁶

The clash between constituents with respect to HB 4572 reflects a polarized state with interest groups fighting one another. In viewing this through a lens of equity, two takeaways can be made. First, the working class, those who are employees rather than employers and represent a larger proportion of the populace, are on average predisposed to advocate for the advancement of their civil rights as these actions impact their lives daily. Second, the difficulty is that most do not recognize that their rights are not protected by

¹⁰⁵ Ibid.

¹⁰⁶ *The Report of the 2015 US Transgender Survey*. National Center for Transgender Equality, www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

way of Title VII of the 1964 Civil Rights Act or the Illinois Human Rights Act amongst others.¹⁰⁷

Political Implications from Support of Either Option

Representative Will Guzzardi, a staunch supporter of HB 4572, did not realize that in most small businesses within the state of Illinois, and in the small businesses of 17 other states, it can be legal to discriminate against employees on the basis of age, race, gender, disability status or religion. As seen through Illinois' recent statewide discussion, requiring the removal of employee minimums thresholds might dissuade the support of traditional, business-oriented backers, along with the money they might contribute to a 2020 reelection effort.¹⁰⁸

House Democratic leader Nancy Pelosi is already promising to prioritize anti-discrimination legislation that would establish widespread equal rights protections for LGBTQ individuals. Pelosi announced that one of the first items on the schedule will be reintroducing the Equality Act.¹⁰⁹ With a Democrat controlled House, the question surrounding the future of the Equality Act changes from *if* to *when*, and as such, the legislation will eventually find its way to the Senate. Whether or not the legislation is released by the committee, its passage in the House will put pressure on Congressional

¹⁰⁷ Underwood, Angela. "Employment Discrimination Bill Seen as Necessary by Some, Burdensome by Others." *Prairie State Wire*, 2 Aug. 2018, prairiestatewire.com/stories/511507843-employment-discrimination-bill-seen-as-necessary-by-some-burdensome-by-others.

¹⁰⁸ Ibid.

¹⁰⁹ Linderman, Juliet. "House Democrats Promise Action on LGBTQ Rights Bill." *AP News*, Associated Press, 29 Oct. 2018, www.apnews.com/d2a837b6b11142348ce8ab24e4bccfbd.

members who are vulnerable in the upcoming 2020 cycle races to stand firm on a singular position.

The day after the midterms, the Colorado Sun ran an article depicting Gardner's position as an inevitable defeat. Gardner, a first-term Republican senator, is planning to seek reelection in a state that Hillary Clinton won by five percentage points. Support for Gardner is lackluster at present; he is viewed unfavorably by 43 percent of likely voters in Colorado compared to 42 percent favorable.¹¹⁰

Already, Gardner's reelection strategy is precarious. His seat is a prime pickup opportunity for Democrats and could determine the control of the U.S. Senate.¹¹¹ Because of the preexisting target on Gardner's candidacy, he must also maintain support within the GOP to prevent a potential primary challenger yet still pivot away from Trump in an election that is slated to be entirely about the current president.¹¹² Arizona Republicans lost a Senate seat in the 2018 midterms because, as analysts put it, Trump continually drags his party down to his level.¹¹³ Gardner, however, has historically pushed against the Trump administration more than the average mid-career GOP senator but still finds his political future in peril.¹¹⁴

¹¹⁰ Frank, John. "2020 Election Starts Now and Cory Gardner Is in Trouble in Colorado." *The Colorado Sun*, 7 Nov. 2018, coloradosun.com/2018/11/07/the-2020-election-starts-today-and-cory-gardner-is-in-trouble/.

¹¹¹ Rakich, Nathaniel. "Senate Update: How This Year's Race Sets Up 2020." *FiveThirtyEight*, 1 Nov. 2018, fivethirtyeight.com/features/senate-update-how-this-years-race-sets-up-2020/.

¹¹² Frank, John. "2020 Election Starts Now and Cory Gardner Is in Trouble in Colorado." *The Colorado Sun*, 7 Nov. 2018, coloradosun.com/2018/11/07/the-2020-election-starts-today-and-cory-gardner-is-in-trouble/.

¹¹³ Yglesias, Matthew. "Republicans Just Lost a Senate Seat in Arizona Because Trump Is an Egomaniac." *Vox.com*, Vox Media, 13 Nov. 2018, www.vox.com/2018/11/13/18090176/midterm-election-results-arizona-senate-trump.

¹¹⁴ Hawkings, David. "Gardner as Trump Scold? Why It Makes Sense - and Why It Doesn't." *Roll Call*, 29 Jan. 2018, www.rollcall.com/news/hawkings/gardner-trump-scold-not-makes-sense.

One way to achieve distance is to continue ushering forth bipartisan solutions. The Lugar Center and Georgetown University McCourt School of Public Policy's new Bipartisan Index lists Gardner as the eighth most bipartisan U.S. senator.¹¹⁵ Gardner was pleased by the ranking, writing, "My job is to represent Colorado in the United States Senate and that means working across party lines to get things done for the state."¹¹⁶ Earlier in 2018, Gardner also received the Bipartisan Policy Center's Legislative Action Award due to his demonstrated power of strong principles combined with a willingness to reach across the political aisle on issues of consequence to the nation.¹¹⁷

In June of 2018, Gardner released bipartisan legislation with Massachusetts Senator Elizabeth Warren to ease federal marijuana enforcement.¹¹⁸ Not only did Gardner work with one of the heaviest hitting Senate Democrats, but he coauthored a bill that would ensure each state has the right to determine the best approach to marijuana within its borders.¹¹⁹ Given that Colorado was the first state to legalize marijuana, there was definite strategy to Gardner's recent legislative efforts, and Colorado's governor-elect also supports likeminded policy.¹²⁰

¹¹⁵ *The Lugar Center - McCourt School Bipartisan Index: Senate Scores 115th Congress First Session (2017)*. The Lugar Center, www.thelugarcenter.org/assets/html/documents/Senate_Scores_115th_Congress_First_Session.pdf.

¹¹⁶ "Gardner, Coffman Get High Rankings On Bipartisan Index." *CBS Denver*, CBS Denver, 25 Apr. 2018, denver.cbslocal.com/2018/04/25/colorado-cory-gardner-mike-coffman-bipartisan-index/.

¹¹⁷ Bunch, Joey. "Who Are Colorado's Champs for D.C. Bipartisanship?" *Colorado Politics*, 25 Apr. 2018, coloradopolitics.com/gardner-coffman-bipartisanship/.

¹¹⁸ Cirillo, Jeff. "Warren, Gardner Unveil Marijuana Bill Easing Federal Enforcement." *Roll Call*, 7 June 2018, www.rollcall.com/news/policy/warren-gardner-unveil-marijuana-bill-easing-federal-enforcement.

¹¹⁹ Aiello, Chloe. "Senators Gardner and Warren Release Bipartisan Marijuana Bill That Prioritizes States' Rights." *CNBC*, CNBC, 7 June 2018, www.cnbc.com/2018/06/07/senators-gardner-and-warren-release-bipartisan-marijuana-bill.html.

¹²⁰ Angell, Tom. "Marijuana In The Governor's Mansion: Record Number Of Candidates Say Legalize It." *Forbes*, Forbes Magazine, 1 Nov. 2018, www.forbes.com/sites/tomangell/2018/11/01/marijuana-in-the-governors-mansion-record-number-of-candidates-say-legalize-it/#7460010e2e93; Morris, Chris. "Colorado Was the First State to Legalize Marijuana. Now Its Governor Won't Rule Out Recriminalizing It." *Fortune*,

Future smart policy options similar to the aforementioned move would be beneficial to Gardner's political fate. Success, for Gardner, will be won or lost on the front of keeping his constituents in Colorado happy, and right now, Gardner must make improvements. One issue Colorado constituents agree upon, outside of marijuana, is that of non-discrimination. National support for non-discrimination laws within the U.S. is at 70 percent; Colorado, however, exceeds the average and has 74 percent approval. This approval surpasses some of the most liberal states and ties with Hawaii and Minnesota as the tenth most supportive state for LGBTQ non-discrimination policy.¹²¹

Support in favor of non-discrimination legislation, such as the Equality Act, would be largely tolerated by Gardner's constituents in Colorado. During the 2018 midterms, Colorado, once an "infamous anti-LGBT hate state,"¹²² elected the first openly gay governor, Polis.¹²³ The state is shifting blue in a myriad of measures, many inclusive of LGBTQ civil rights advancement.¹²⁴

Supporting non-discrimination legislation would mark a critical shift in Gardner's policy stance. It would be a choice that would go against much of his anti-LGBTQ inclusive political history and have the possibility of creating new supporters with minimal damage

Fortune, 20 Apr. 2018, fortune.com/2018/04/20/colorado-marijuana-legalization-law-governor-hickenlooper/.

¹²¹ "Nondiscrimination Laws Popular Across States." *PRRI*, PRRI, www.prii.org/wp-content/uploads/2018/04/AVA-2017-Figure_10.png.

¹²² Swenson, Kyle. "Colorado, Once the Infamous Anti-LGBT 'Hate State,' Becomes First to Elect an Openly Gay Governor." *The Washington Post*, WP Company, 7 Nov. 2018, www.washingtonpost.com/nation/2018/11/07/once-infamous-anti-lgbt-hate-state-colorado-elects-first-openly-gay-governor/?utm_term=.7b9a7129b48d.

¹²³ Coltrain, Nick. "Colorado Governor: Jared Polis Is First Openly Gay Man Elected Governor in US." *Coloradoan*, Coloradoan, 6 Nov. 2018, www.coloradoan.com/story/news/politics/elections/2018/11/06/colorado-governor-jared-polis-wins-2018-race-against-walker-stapleton/1862928002/.

¹²⁴ "Colorado Election Results." *The New York Times*, The New York Times, 6 Nov. 2018, www.nytimes.com/interactive/2018/11/06/us/elections/results-colorado-elections.html.

to that of Gardner's GOP base. There is momentum for LGBTQ inclusive policies within Colorado, even if Gardner's record as a Colorado state representative reveals that he consistently fought against legislation granting numerous rights to the Colorado LGBTQ community. With a track record such as this, Gardener is likely to face a Democratic challenger who encompasses many of the virtues that Gardener has opposed over the course of his political career. In short, Gardener will most likely face a Democrat encompassing the political chops of Polis, someone who will compel supporters to the polls in 2020.¹²⁵

The critical point is whether or not Gardner's political fate is predetermined and if an emboldened move, like supporting an amendment to the Equality Act, could prevent a potential loss to a LGBTQ inclusive Democratic challenger. Although such an action does increase the odds of a potential primary challenger, Gardner could appeal to Coloradoans at large during the 2020 primary. As of 2016, the state has open Democrat and Republican congressional and state primaries. The viability of that scenario would be contingent on galvanizing the LGBTQ Colorado community and making an effective case for bipartisan electorate support.¹²⁶

It is also important to assess Colorado political trends since the 2018 midterms. Of Colorado's seven Congressional districts, the intensity of Democrat wins has increased from 2014 to 2018. Democratic districts are trending bluer, and Republican districts are trending more pink or purple, instead of red. The exception is the 5th District, which

¹²⁵ Yost, Mike. "Udall vs. Gardner on LGBT Rights: A Stark Contrast." *OUTFRONT*, OUTFRONT, 14 Oct. 2014, www.outfrontmagazine.com/trending/udall-vs-gardner-lgbt-rights-stark-contrast/.

¹²⁶ "Colorado." *Primary Elections State by State*, Open Primaries, www.openprimaries.org/states_colorado.

includes Colorado Springs, Salida and Fairplay, and shifted back to its 2014 margin upon the 2018 midterms.¹²⁷

During the 2018 midterms, only seven of Colorado's 64 counties split their vote in the top-of-the-ticket races, and this year, Polis' gubernatorial race win flipped two traditionally Republican counties. An assessment of the three past statewide election cycles suggests that only these seven counties are considered toss-ups in the future, with five of the seven being small in terms of population size. A deeper analysis even suggests that five traditional swing counties, including four Denver Metro counties and Larimer, home to Fort Collins and the Wyoming border, vote more Democratic now that Trump is head of the Republican party. This indicates increasingly uphill odds for Gardner's reelection bid in 2020 and forecasts a potential need to shake up his political footprint.¹²⁸

Making the advancement of civil rights protection a political priority is something Gardener should certainly consider. It is risky, but it is big enough to possibly sway Gardner's current 2020 trajectory. Not only does Gardner need to finesse a policy strategy to buttress his reelection quest, but he also needs to strategize on financing his campaign. Already, Amazon CEO Jeff Bezos donated more than \$10,000 to Cory Gardner's reelection campaign.¹²⁹ This action, to many, was seen as highly irregular, being as Bezos only last year accepted Human Rights Campaigns' National Equality Award and touted that "equality is a core value." If Gardner commits to advancing LGBTQ rights, it is almost

¹²⁷ Frank, John. "Three Graphics That Explain the 2018 Election and Colorado's Political Future." *The Colorado Sun*, The Colorado Sun, 12 Nov. 2018, coloradosun.com/2018/11/12/2018-election-and-future-3-graphics/.

¹²⁸ Ibid.

¹²⁹ Jackman, Josh. "Jeff Bezos, Award-Winning LGBT Advocate, Donates \$10,000 to Anti-Gay Republican." *PinkNews*, PinkNews Politics, 31 Oct. 2018, www.pinknews.co.uk/2018/10/31/jeff-bezos-amazon-lgbt-donates-10000-gay-republican/.

certain that Bezos would be able to secure, or at least inspire, campaign contributions from other financially well-off individuals. This would likely offset the Colorado business community's potential concern over the elimination of the employee threshold policy.

Recommendation

In assessing the inherent pros and cons to the two proposed policies, it is incumbent to keep in mind the criterion in which they were measured in the previous two sections of analysis: equity, morality and power, with maintaining political power likely inching out as the more important of the three with respect to Gardner's ambitions.

Equity and Morality

In guaranteeing equity, Option 2, support of the Equality Act dependent upon sufficient EEOC funding and elimination of the employee threshold policy, achieves the most fairness throughout. In examining the policy from a utilitarian perspective, the greatest good for the greatest number of Americans can be achieved by way of policy Option 2 and ranks number one of the three policy choices; Option 1, sole support of the Equality Act, ranks second, and finally, opting out of either policy option ranks third and would be the least effective conduit in achieving equality.

Given the historic background of Title VII and its failing as a legislative directive to achieve its advertised goal of civil rights protections, support of the second policy option is by and large the most moral of the three choices afforded to Gardner. Again, in examining the policy options in accordance to moral imperative, the ranking is similar to that of the utilitarianism spectrum. On a scale of most to least moral, Option 2 is the most

moral, with Option 1 being safely in second place, still moral but not as complete as it could be, and the option of opting out of either proposed policy ranking third. In fact, given the idea of a moral imperative, abdicating from supporting either Option 1 or Option 2 is ill-advised. Such an act does not make the most of Gardner's current political power and fails to provide the best outcome for the American people.

Hegemony and 2020

Bearing in mind Gardner's historic affinity in supporting anti-LGBTQ legislation, it is unlikely that either equity or morality will be convincing enough factors for Gardner's support of anti-discrimination LGBTQ protection legislation at the federal level. The factor with the perceived greatest influence instead surrounds Gardner's political survival. According to a November 9, 2018, interview, Gardner is promoting a "four corners" election strategy for the 2020 cycle. Gardner made his end goal clear, stating, "My goal is to win over the people of Colorado. It's not about Republicans or Democrats. This is about making sure every single day we focus on what is best for the state, and I never look at that through the lens of who's right or who's left, who's red or who's blue. I look at that from a four corners perspective."¹³⁰

Assuming Gardner continues similar rhetoric in the future and given recent political trends within Colorado, there is merit in supporting either proposed policy option. The real matter to consider is which policy has the greatest chance of propelling Gardner to a win. Option 1, while salient, may not be enough to clinch victory.

¹³⁰ Boyd, Shaun. "Cory Gardner Takes 'Four Corners Perspective' In Look Ahead To Campaign 2020." *CBS Denver*, CBS Denver, 9 Nov. 2018, denver.cbslocal.com/2018/11/09/cory-gardner-election-colorado-politics/.

This paper officially advocates for Option 2. With 150 LGBTQ candidates claiming victory in the 2018 midterms¹³¹ and the widespread support for Colorado's first openly gay governor, Polis, there is inherent pro-LGBTQ sentiment country-wide, as well as statewide. Gardner can utilize this trend to his advantage and tap into securing more votes from the LGBTQ community, along with other protected groups, by supporting the Equality Act and requiring the elimination of the employee threshold and guaranteeing satisfactory EEOC funding.

This would ensure ample news coverage since Gardner would be introducing an important but not widely talked about topic to the Hill through the removal of the federal employee minimum threshold. Even if the amendment fails, Gardner's support of the Equality Act and publicized desire to comprehensively ensure employee protections would all but confirm a number of positive, pro-Gardner op-eds targeted at voter audiences not traditionally found in the Gardner camp. This would allow Gardner the best chance at maintaining his hegemony in the U.S. Senate.

Gardener's impending 2020 loss is assumed by media outlets and political analysts. For Gardener to remain competitive, he must adapt to the current political climate. Marked by political turbulence and fluctuations from the 2018 midterm elections, the 2020 cycle will likely focus on top-of-the-ticket strategies due to the polarizing nature of Trump's White House. To deviate from this, a bold strategy to attract and energize voters is necessary.

¹³¹ Moreau, Julie. "Over 150 LGBTQ Candidates Claim Victory in Midterm Elections." *NBCNews.com*, NBCUniversal News Group, 7 Nov. 2018, www.nbcnews.com/feature/nbc-out/over-100-lgbtq-candidates-claim-victory-midterm-elections-n933646.

Option 2, as outlined above, engenders goodwill and proves politically expedient, warranting it worthy of consideration.

Curriculum Vitae

Sarah-Grace Parr grew up in Atlanta, Georgia, and obtained her undergraduate degree from the Georgia Institute of Technology. She graduated in 2013 with a Bachelor of Science in International Affairs and a minor in Law, Science and Technology. Sarah-Grace subsequently moved to Washington, D.C., to pursue a career in international development. A globally minded professional, she has provided program management and backstopping support to capacity building projects with the U.S. Agency for International Development (USAID). Sarah-Grace excels at conducting complex analysis, developing budget solutions and navigating puzzles inherent to project and performance management.